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Nos. 00-596, 597

IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., ET AL.,

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., ET AL.

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the permissible locations for tobacco advertising, but do not affect the federally mandated health warning for cigarettes, are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether, under the First Amendment, regulations that merely restrict the display of publicly visible tobacco advertising in locations near schools and playgrounds are properly analyzed under the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), and, if so, whether the regulations satisfy that test.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OTHER CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT 2

Prior Proceedings and Decisions 11

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. REGULATIONS THAT RESTRICT THE LOCATION OF TOBACCO ADVERTISING ARE NOT PREEMPTED BY THE CIGARETTE LABELING AND ADVERTISING ACT. 16

II. THE MASSACHUSETTS REGULATIONS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT. 28

A. Regulations that Restrict the Location of Publicly Visible Tobacco Advertising to Protect Children from its Influence are Properly Analyzed Under Intermediate Scrutiny. 29

B. The Regulations Satisfy Intermediate Scrutiny under the *Central Hudson* Test. 35

1. Massachusetts has a compelling interest in protecting children by reducing their exposure to tobacco advertising. 36

2. Restricting the daily exposure of children to tobacco advertising will materially advance the State's interests. 37

3. The regulations are narrowly tailored in targeting advertising near schools and playgrounds. 42

CONCLUSION 50

TABLE OF AUTHORITIES

CASES:

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) ..... *passim*

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 31, 43

Bellotti v. Baird, 443 U.S. 622 (1979) 37, 40

Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) ..... 43, 45, 46 & n, 47

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 33, 34, 37n

Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408 (1989) 20

Burson v. Freeman, 504 U.S. 191 (1992) 38, 45

California Div. of Labor Stds. Enforcement v. Dillingham Constr., 519 U.S. 316 (1997) 19

Capital Broadcasting Company v. Mitchell, 333 F. Supp. 582 (1971), *summarily aff'd*, 405 U.S. 1000 (1972) 36, 37

Carey v. Population Services International, 431 U.S. 678 (1977) 44

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) ..... *passim*

Cipollone v. Liggett Group, Inc. 505 U.S. 504 (1992) ..... *passim*

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 30

City of Cincinnati v. Discovery Network, Inc. 507 U.S. 410 (1993) ..... 31 & n, 47, 48

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 31, 46

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 22

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 33, 34, 43

Edenfield v. Fane, 507 U.S. 761 (1993) 33, 38

Federal Trade Comm'n v. Keppel & Bro., 291 U.S. 304 (1934) ..... 32 & n, 33

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 37, 43, 44

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 29, 38, 40, 43

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 3, 5n, 22, 25

Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88 (1992) 21n

Ginsberg v. New York, 390 U.S. 629 (1968) 36, 37, 40n

Grayned v. City of Rockford, 408 U.S. 104 (1972) 45, 46

Greater New Orleans Broadcasting Ass'n., Inc. v. United States, 527 U.S. 173 (1999) 29, 44

Greater N.Y. Metro Food Council v. Giuliani, 195 F.3d 100 (2nd Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) 12, 24

Hill v. Colorado, 120 S.Ct. 2480 (2000) 45

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 47n

INS v. Nat'l Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 46

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 19

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 43

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 36

Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73, *cert. denied*, 513 U.S. 1016 (1994) 35n

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 18, 19, 20, 27

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) ..... *passim*

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 21

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 39

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978) 29, 32, 40

Packer Corp. v. Utah, 285 U.S. 105 (1932) 19, 23, 28, 43

Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030, *modified by*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) 11, 12, 25

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 22

Prince v. Massachusetts, 321 U.S. 158 (1944) 36

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 31, 32, 33

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 36

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 19

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 40n

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 36, 44, 49

State v. Packer Corp., 297 P. 1013 (Utah 1931) 38, 48n

St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919) 17

Stone v. Mississippi, 101 U.S. 814 (1880) 41

United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) 38, 43

United States v. Playboy Entertainment Group, 529 U.S. 803 (2000) 49

United States v. Winstar Corp., 518 U.S. 839 (1996) 41

Upper Midwest Booksellers Ass'n. v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985) 46n

Vango Media, Inc. v. City of New York, 34 F.3d 68 (2nd Cir. 1994) 22, 23

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 34, 43

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES:

United States Constitution
First Amendment ..... *passim*

United States Code
15 U.S.C. § 1331 ..... *passim*
15 U.S.C. §§ 1331-1340 ..... 13, 16, 32
15 U.S.C. § 1332 ..... 16n
15 U.S.C. § 1333 17
15 U.S.C. § 1334(b) ..... *passim*
15 U.S.C. § 1335 28
15 U.S.C. § 1337 39
15 U.S.C. § 1341(c) 39
15 U.S.C. § 4402(f) 28
42 U.S.C. § 300x-26(b) 37

Massachusetts General Laws
c. 93, § 29 24
c. 93A, § 2(a) 25, 35n
c. 93A, § 2(c) 8
c. 270, § 6 ..... 8, 33, 37

Code of Massachusetts Regulations
940 C.M.R. § 21.00 *et seq.* 8
940 C.M.R. § 21.01 ..... 8, 38
940 C.M.R. § 21.02 ..... 35n
940 C.M.R. § 21.03 34
940 C.M.R. § 21.04(1)-(4) 9, 47n
940 C.M.R. § 21.04(1)(a) 18n
940 C.M.R. § 21.04(1)(c) 18n
940 C.M.R. § 21.04(4)(a) 18n
940 C.M.R. § 21.04(5)(a) 9
940 C.M.R. § 21.04(5)(b) 9
940 C.M.R. § 21.04(6) 9n
940 C.M.R. § 22.00 *et seq.* 8
940 C.M.R. § 22.01 38
940 C.M.R. § 22.01(2) 8
940 C.M.R. § 22.02 ..... 35n
940 C.M.R. § 22.06(1)-(4) 9, 47n
940 C.M.R. § 22.06(2)(c) 8
940 C.M.R. § 22.06(5)(a) 9
940 C.M.R. § 22.06(5)(b) 9
940 C.M.R. § 22.06(6) 9n

Texas Health and Safety Code § 161.122 9

Utah Code Ann. § 76-10-102 (1999) 9, 27

Senate Report No. 91-566 (1969), *reprinted in*
1970 U.S.C.C.A.N. 2652 ..... 20n, 23n, 27

Statement of Senator Moss, *reprinted in*
1970 U.S.C.C.A.N. 2668 27

OTHER CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

In addition to the constitutional, statutory and regulatory provisions set forth in the Brief of Petitioners Lorillard Tobacco Co., *et al.* in No. 00-596 (hereafter "Pet. Br."), and in the appendix to the Petition for Writ of Certiorari in No. 00-596 (hereafter "Pet. App."), the following statutory provision is involved.

Section 2 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1331, provides:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

INTRODUCTION

This case concerns the power of a State to take reasonable measures to limit advertising near schools and playgrounds promoting a harmful product that is illegal for sale to minors. None of the parties before the Court disputes that the vast majority of tobacco use begins with children, that children are exposed to the selling message of tobacco advertising each day, and that prevention of youth tobacco use is a paramount governmental concern. Indeed, none of the petitioners claims any right to advertise to children, nor could they. Thus, under the First Amendment, the petitioners raise the relatively narrow issue of whether Massachusetts has chosen appropriate means to protect an unintended audience from exposure to tobacco advertising, while still permitting adults ample access to tobacco product information through other channels. The limited nature of Massachusetts' restrictions — which prohibit only publicly visible tobacco advertising near schools and playgrounds — makes plain that the challenged regulations are appropriately tailored. For similar reasons, the regulations are clearly outside the scope of preemption under the Federal Cigarette Labeling and Advertising Act, wherein Congress precluded the States from regulating the health-related content of cigarette advertising, but indicated no intention to foreclose the States' historic power to limit the locations in which advertising may be displayed.

STATEMENT

1. Tobacco use, in particular cigarette smoking, is the leading preventable cause of disease and premature death in the United States. Joint Appendix (hereafter "JA") 188. Overwhelmingly, smoking and smokeless tobacco use begin, and become established, in adolescence. JA 177, 187, 194, 195, 210; State's Lodging (hereafter "Ldg.") 8. The average age at which smokers try their first cigarette is 14 ½

years. JA 210. Nationally, 82% of adult smokers started smoking before the age of 18, and approximately 70% of them had become regular smokers by that age. JA 210, 214. The Surgeon General has found that "[m]ost young people who smoke regularly are already addicted to nicotine, and they experience this addiction in a manner and severity similar to what adult smokers experience." JA 190. Thus, addiction to the nicotine in tobacco occurs almost exclusively during adolescence and young adulthood. JA 194, 195.

The consequences of youth tobacco use are severe. The younger a person begins to smoke, the more likely he or she is to become a heavy smoker. JA 189, 190, 214. An adolescent who continues smoking into adulthood substantially increases his or her risk of dying from cancer, heart disease or lung disease. JA 189-190, 214, 218. Continued use of smokeless tobacco is associated with a range of oral cancers. JA 190. Likewise, regular cigar smoking causes cancer of the lung, oral cavity, larynx and esophagus. JA 244. As this Court recently recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

A person who does not begin smoking in childhood or adolescence is unlikely ever to begin. JA 214. Thus, the Surgeon General has stated that "young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases." JA 192. Yet "efforts to prevent the onset or continuance of tobacco use face the pervasive challenge of promotion activity by the tobacco industry." Ldg. 18. Cigarettes and smokeless tobacco are among the most

intensely advertised and widely promoted products in America. JA 215. In 1999, the cigarette companies spent $8.24 billion — more than in any prior year — on advertising and promotion in a variety of media, including magazines, newspapers, outdoor advertising, retail advertising and promotions, and direct mail campaigns. Ldg. 27. The three most heavily advertised cigarette brands — Marlboro, Newport and Camel — are purchased by 85% of adolescent smokers. JA 210. Adults, on the other hand, purchase a greater variety of brands (including discount and generic brands) that receive relatively little advertising exposure. JA 215; Ldg. 17.

2. It has been extensively documented by the Surgeon General and other leading health authorities that tobacco advertising promotes both the initiation of tobacco use by minors and reinforces that use in minors who use tobacco.[1] In his most recent report, the Surgeon General found that "[c]onsiderable evidence has accumulated showing that advertising and promotion are perhaps the main motivators for adopting and maintaining tobacco use." Ldg. 3. Interventions aimed at minors are essential, because "[c]hildren and teenagers constitute the majority of all new smokers, and the industry's advertising and promotion campaigns often have special appeal to these young people."

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[1] In support of his motion for summary judgment, the respondent submitted to the district court the findings of the Surgeon General, the Institute of Medicine of the National Academy of Sciences (IOM) and the Food and Drug Administration (FDA) concerning the effect of tobacco advertising on youth tobacco use, and the leading studies that address this issue. JA 101-128 (abstracting studies); 176-238 (excerpts from Surgeon General, IOM and FDA findings). *See* First Cir. JCA (hereafter "JCA") 1199-3087. Excerpts from the Surgeon General's 2000 report, and other evidence published since the case was submitted to the court of appeals, are included in the State's Lodging.

Ldg. 18. The Surgeon General has concluded that "[r]egulation of [the] advertising and promotion [of tobacco], particularly that directed at young people, is very likely to reduce both prevalence and uptake of smoking" and has recommended restrictions on tobacco advertising as part of a comprehensive program to address youth tobacco use. Ldg. 2, 11. The U.S. Centers for Disease Control and Prevention (CDC) and the Institute of Medicine of the National Academy of Sciences have made similar recommendations. JA 185, 212.[2]

A substantial body of evidence from diverse disciplines confirms that tobacco advertising reaches and influences young people. JA 101-128. Both medical and marketing researchers have found a significant correlation between the amount of cigarette advertising or promotion a young person is exposed to and positive attitudes toward smoking, smoking experimentation, and regular smoking. JA 108-120; JCA 1664-2012. Recently, longitudinal studies have demonstrated directly the relationship between advertising and progression to established smoking among adolescents. JA 109 (¶ 33), 120-121. Other studies have documented the dramatic effect of particular tobacco advertising campaigns in recruiting new young smokers and smokeless tobacco users. JA 107-108, 207-208, 221-222;

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[2] Similarly, after an exhaustive examination of the evidence, the Food and Drug Administration in 1995 issued a proposed rule that would have restricted tobacco advertising in various respects, including by prohibiting all outdoor advertising within 1,000 feet of any public playground or school. *See Brown & Williamson Tobacco Corp*, 529 U.S. at 128. Although the Court held that the FDA did not have statutory authority to regulate tobacco products as customarily marketed, *id.* at 160-161, it relied in various respects on the agency's findings in reaching that conclusion. *Id.* at 134-135. *See also* JA 213-238 (excerpts of proposed and final FDA rule and commentary).

Ldg. 5-6, 8.[3] Finally, studies have shown a decrease in smoking rates in countries that have banned or significantly restricted tobacco advertising, even when other factors, such as price, were controlled for. JA 208. *See* JA 122-123.[4]

The Surgeon General has concluded that tobacco advertising influences children and adolescents in at least two ways. First, tobacco advertising uses images — rather than information — "to portray the attractiveness and function of smoking." JA 197. The featured themes include adventure seeking, peer approval, sex appeal, success, sophistication and independence, all of which resonate especially with adolescents as they strive to define their identities during the transition to adulthood. JA 192, 197; *see* JA 211, 219. Because tobacco advertising portrays, in smokers, "attributes that children and adolescents would like to have," it implies that smoking may "close the gap" between an adolescent's actual self-image and the ideal for which he or she strives. JA 197, 206. Second, highly repetitious advertising exposure leads minors to overestimate the prevalence and "normalcy" of smoking among both peers

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[3] For example, in the late 1980's, the Camel brand's share of the youth market in California increased by 230% after R.J. Reynolds introduced an advertising campaign featuring the Joe Camel cartoon character; during the same period Camel's market share among adults remained essentially unchanged. JA 221-222. Similarly, in the early 1970's the prevalence of smoking by girls under age 18 jumped significantly following intensive advertising of Virginia Slims and other new "women's brands." JA 207-208, 222, 234.

[4] Moreover, it is undisputed that tobacco advertising reinforces *continued* tobacco use by minors who use tobacco products, many of whom are already experiencing nicotine addiction. JA 205-206, 223; Ldg. 9. The cigarette companies specifically allege that one purpose and effect of their advertising is to "reinforce the brand preferences of smokers." JA 14.

and adults. JA 197, 207. The degree of youth overestimation of smoking prevalence is, in turn, one of the strongest predictors of smoking initiation. JA 207; *see* JA 123-125, 220; Ldg. 6. These findings are echoed in a 1994 report of the Institute of Medicine. JA 182-184.

In Massachusetts, children are routinely exposed to a significant volume of tobacco advertising. Two Massachusetts studies have documented that the density of such advertising is particularly high in areas where young people spend time, such as near schools, constituting over one-half of the advertisements visible from outside retail establishments surveyed. JA 95, 105-106; *see* Ldg. 58. One of these studies found that 32% of outdoor cigarette advertisements, including those inside stores and visible from the outside, were at children's eye level (i.e. below 3.5 feet). JA 105; JCA 2384.

3. In 1993, Massachusetts established its statewide tobacco control program, funded by a 1992 increase in the cigarette tax. JA 90-91; Ldg. 13-15. The State's tobacco control efforts include extensive school-based tobacco prevention programs, intensive enforcement of youth access restrictions, a sustained counter-advertising campaign, local licensing requirements for tobacco retailers, and scores of community based anti-tobacco programs, which implement a wide range of youth education, access restriction and cessation programs. JA 90-96; Ldg. 13-15. Between 1994 and 1998 local boards of health conducted 31,603 controlled buying attempts by minors (i.e. "stings") against tobacco retailers, cutting in half the rate of violation of the state tobacco sales law. JA 93. Massachusetts also maintains one of the highest cigarette taxes in the country. JCA 671, 784. In 1999, Massachusetts was recognized by the CDC as maintaining one of the two leading tobacco programs in the Nation. JA 91, 97.

Despite these initiatives, youth tobacco use in Massachusetts remains unacceptably high. In 1999, the rate of recent smoking (*i.e.* past 30 days) among Massachusetts high school students was 30%, with 13% of high school students smoking every day. JA 285, 286, 292. Twenty-three per cent of Massachusetts students report smoking their first whole cigarette before age 13, a rate which has dropped only one percentage point since 1993. JA 285, 288. In 1999, 4.9% of Massachusetts high school students used smokeless tobacco and 15.6% used cigars. JA 288, 292. In 1996, the CDC estimated that, if current trends continue, 105,000 Massachusetts children alive today will die prematurely of cigarette smoking. Ldg. 71.

4. Pursuant to his authority under Mass. Gen. Laws c. 93A, § 2(c), on May 1, 1998, the Attorney General issued a notice of proposed regulations concerning the sale and marketing of tobacco products. Final regulations, as revised following rulemaking proceedings, were issued in January 1999. 940 Code Mass. Reg. 21.00, *et seq.* and 22.00, *et seq.*, Pet. App. 105a-126a. The purpose of the regulations is to "address the incidence of [tobacco] use by children under legal age . . . [and] to prevent access to such products by underage consumers." 940 C.M.R. §§ 21.01, 22.01(2), Pet. App. 105a, 115a. The regulations seek to: (1) reduce youth access to tobacco by prohibiting marketing practices that promote the illegal distribution of tobacco products to minors, *see* Mass. Gen. Laws c. 270, § 6, and (2) reduce youth demand for tobacco by restricting tobacco advertising in areas where children see it frequently.

Among other things, the regulations require retailers to verify the age of all tobacco purchasers appearing to be under 27 and prohibit retail practices known to facilitate minors' access to tobacco, such as the distribution of free samples, the sale of products through the mail without age verification, and the use of "self-service" tobacco product

displays. 940 C.M.R. §§ 21.04(1)-(4); 22.06(1)-(4), Pet. App. 108a-110a, 120a-123a.[5] The regulations also prohibit "[o]utdoor [tobacco] advertising, including advertising . . . from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." 940 C.M.R. §§ 21.04(5)(a), 22.06(5)(a), Pet. App. 111a, 123a. For retailers located in these areas, the regulations also prohibit interior tobacco advertising placed at children's eye level (*i.e.* lower than five feet from the floor). 940 C.M.R. §§ 21.04(5)(b), 22.06(5)(b), Pet. App. 111a, 123a.[6]

In enacting its regulations, Massachusetts joined a growing number of States and localities that have placed location-based restrictions on tobacco advertising. One state, Utah, has entirely prohibited outdoor tobacco advertising since 1929. Utah Code Ann. § 76-10-102 (1999). *See also, e.g.*, Pet. App. 131a, *citing* Texas Health and Safety Code § 161.122 (prohibiting, with certain exceptions, tobacco advertisements within 1,000 feet of a church or school).

Petitioners' repeated assertion that the Massachusetts regulations impose a "near-total ban" on tobacco advertising is a significant overstatement. Pet. Br. 25, 45. The

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[5] The regulations also allowed a retailer, at its discretion, to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here'" on the outside of, or visible from, the retail premises. 940 C.M.R. §§ 21.04(6), 22.06(6), Pet. App. 111a, 123a. The district court held this so called "tombstone" provision preempted and the Attorney General did not appeal that ruling. Pet. App. 6a.

[6] Retail outlets that do not admit minors are exempt from the regulations' marketing and interior advertising restrictions. Pet. App. 113a-114a, 125a-126a.

regulations place no restrictions on petitioners' advertising in areas outside the school and playground zones, nor do they affect advertising in magazines, newspapers, direct mail and other media. Moreover, on its face petitioners' survey did *not* "reveal[] that between 87 and 91 percent of the land area of [three Massachusetts cities] was covered" by the regulations. Pet. Br. 4. Instead, the survey discloses that these percentages of land area "would be unavailable" for outdoor tobacco advertising after aggregating the school/playground zones defined in the regulations and all *other* areas (such as residential zones, colleges, cemeteries, parks, playgrounds and schools) where advertising is restricted for other reasons. *See* JA 164-167. Petitioners' survey affidavit does not identify the substantially smaller percentage of land area that the 1,000 foot school and playground zones would occupy. *See, e.g.*, JA 166 (Worcester survey map).

5. On November 23, 1998, Massachusetts entered into a multi-state agreement, known as the Master Settlement Agreement (or "MSA"), which resolved certain of the States' litigation against the major cigarette companies. Under the MSA, the petitioner cigarette companies are prohibited from displaying any outdoor advertising (including on billboards) or transit advertising. JA 259, 263-264. The MSA excepts from these restrictions the display of exterior advertising, no larger than 14 square feet, at retail outlets selling cigarettes and places no restrictions on interior retail advertising. *Id.* Since the MSA was executed, cigarette manufacturers have taken full advantage of these exceptions, increasing their point-of-sale advertising by 13.3% from 1998 to 1999. Ldg. 28, 59, 61. In fact, total cigarette advertising expenditures increased by 22.3% in 1999, the year following the execution of the MSA, Ldg. 27, indicating that the companies are engaged in extensive promotional activity in areas that are unrestricted by the agreement. Ldg. 62.

Prior Proceedings and Decisions

On May 21, 1999, petitioner cigarette manufacturers filed this action in the United States District Court for the District of Massachusetts. JA 1. These companies claimed preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), 15 U.S.C. § 1334(b), of both the regulations' restrictions on tobacco advertising and the regulations' bans on free product giveaways and the sale of tobacco products through the mail without age verification. Pet. App 48a-49a. Petitioners also claimed that the advertising restrictions and the prohibition of self-service tobacco displays violate the First Amendment. Pet. App. 63a. The petitioner smokeless tobacco and cigar companies later filed similar actions in the same court. JA 16, 61.

On December 2, 1999, the district court (Young, C.J.) granted summary judgment for the State on petitioners' preemption claim. Pet. App. 46a, 59a-60a. The district court identified the decisive issue as whether the challenged regulations constitute a requirement or prohibition "based on smoking and health," as that phrase is used in the FCLAA's preemption clause, Section 1334(b). Pet. App. 51a. The court found it significant that Congress expressly stated its purpose with respect to preemption — to prevent nonuniform cigarette labeling and advertising regulations "with respect to any *relationship between smoking and health*." Pet. App. 54a, *quoting* 15 U.S.C. § 1331 (emphasis in opinion). The court found that the Massachusetts advertising regulations "do not implicate the relationship between smoking and health. Rather, they 'simply restrict the location of cigarette-advertising signs, irrespective of the nature of the message communicated.'" Pet. App. 56a, *quoting Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded,* 518 U.S. 1030, *modified by,*

101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997).

The district court also granted, in substantial part, the State's motion for summary judgment on petitioners' claims under the First Amendment. Pet. App. 104a. Applying the test for review of commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the court concluded that "the Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking." Pet. App. 75a. The district court found, with respect to the outdoor advertising regulation, that the defined school and playground zones were sufficiently narrowly tailored, but held that the Attorney General had not supported his view that minors would also more frequently enter retail stores within the 1,000 foot zones, and so held the indoor advertising provision invalid. Pet. App. 78a-83a.

The First Circuit affirmed the district court's decision with respect to preemption. Relying on recent decisions of the Second and Seventh Circuits, the court rejected petitioners' argument that the FCLAA preempts all state regulations "with respect to [tobacco] advertising." Pet. App. 9a-13a. Considering the FCLAA's preemption clause and its express statement of purpose, the court concluded "that Congress sought to inform the public of the health risks associated with smoking, and . . . to protect the national economy from the burdens that would result from a multitude of 'diverse, nonuniform, and confusing' advertising standards." Pet. App. 10a, *quoting Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 106 (2nd Cir. 1999), *cert. denied,* 529 U.S. 1066 (2000). The court found that Massachusetts' location-based restriction "do[es]

not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information." *Id.*

The First Circuit also upheld the advertising regulations under the First Amendment. Applying the *Central Hudson* test, the court found "that the Attorney General has offered sufficient product-specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a 'real harm' and that the regulations can be reasonably expected to alleviate those harms to a material degree." Pet. App. 21a. The court concluded that the advertising restrictions would reduce the visibility of tobacco products to minors and eliminate "the psychological incentives to tobacco use presented by things as simple as attractive ad color and design," which the court agreed "may reasonably be assumed to have a greater effect on young people." Pet. App. 28a-29a. Under *Central Hudson*'s final prong, the court found the regulations sufficiently narrowly tailored because of their "obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds — areas where children are more likely to be." Pet. App. 30a. The First Circuit thus affirmed in part and reversed in part the district court's First Amendment ruling. Pet. App. 45a.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that a State law limiting the locations for display of tobacco advertising is not preempted by the Federal Cigarette Labeling and Advertising Act. Pub. L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340. The Act's purpose is clear: to mandate a uniform national health warning for cigarette packages and advertising while avoiding the burden to commerce from the imposition of conflicting health

warning requirements under state law. *See* 15 U.S.C. §§ 1331. Section 5(b) of the Act preempts only those state law requirements or prohibitions that are "based on smoking and health . . . with respect to the advertising or promotion of [properly labeled] cigarettes . . . ." Nothing in this text, or the Act's purpose or legislative history, suggests that Congress intended to intrude upon the traditional exercise of state and local zoning authority over commercial advertising. Rather, Congress created a program "to deal with cigarette labeling and advertising with respect to any *relationship* between smoking and health," 15 U.S.C. § 1331 (emphasis added), thus seeking to maintain exclusive federal control of the health-related *informational content* of cigarette packaging and advertising. Congress provided for preemption under § 5(b) to implement this statutory objective. This distinction is reflected in the result reached in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), where the plurality held preempted only those of the asserted claims that challenged the adequacy of the warning in the manufacturers' advertising. *Id.* at 524-531. Although the amendments to § 5(b) in 1969 expanded the *forms* of advertising content regulation that can be preempted, such as to include common law claims in addition to "positive enactments," *see id.* at 524, the 1969 amendments left in § 5(b) the critical "smoking and health" language limiting preemption to health-related advertising content. The Massachusetts regulations, which restrict only the location of cigarette advertising while leaving its content unaffected, are therefore not preempted.

2. Intermediate scrutiny is the appropriate standard for judicial review under the First Amendment of regulations that merely zone publicly visible tobacco advertising away from schools and playgrounds. In the regulations, Massachusetts has addressed the specific harms to children presented by tobacco advertising they unavoidably confront in the areas they spend time each day.

At the same time, petitioners remain free to communicate product and price information to adults through advertising in other locations, and in magazines, newspapers, by direct mail or other media. The regulations clearly do not "ban" commercial speech, but merely regulate its "place." Consequently, they should be reviewed consistently with various forms of "time, place and manner" restrictions on speech, for which intermediate scrutiny is well established.

That these locational restrictions are limited to the advertising of *tobacco,* but not other products, does not require heightened review. The State has drawn an entirely permissible distinction. The regulations are intended to further the State's law against tobacco sales to minors, and thus exhibit a close connection to a commercial transaction the State has prohibited. In addition, because tobacco advertising exerts an "undue influence" on children — who constitute the vast majority of new tobacco users — it can be singled out for regulation. Unlike the "blanket prohibition" on speech to *adults* that the Court unanimously stuck down in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Massachusetts regulations simply zone advertising away from the areas that children congregate.

3. The Massachusetts regulations satisfy each of the criteria for regulation of commercial speech under *Central Hudson*, 447 U.S. at 566. The governmental interests that support the regulations are compelling — the promotion of Massachusetts' policy against tobacco sales to minors and, ultimately, protection of the well-being of the State's children. Substantial evidence demonstrates the significant influence of tobacco advertising in promoting and maintaining tobacco use by minors. Thus, restricting tobacco advertising in areas where children attend school and play will directly and materially advance the State's interest.

Moreover, the regulations are narrowly tailored under the *Central Hudson* standard, even if they prevent some tobacco advertising from reaching adults. Petitioners remain free to advertise to adults in areas beyond the school and playground zones, and through other permitted channels. The petitioners themselves determined in 1990 to cease billboard advertising in areas within 500 feet of schools and playgrounds. The State's determination to set this distance at 1,000 feet (approximately three blocks) and to restrict certain interior retail tobacco advertising in these zones is entitled to deference. There is also no "obvious" alternative to a restriction of speech. Aggressive enforcement of the youth tobacco sales law, which Massachusetts has pursued, does not address the stimulation of youth *demand* for tobacco by petitioners' advertising. Especially given the magnitude of the problem Massachusetts seeks to address, its determination to restrict tobacco advertising near its communities' schools and playgrounds should be upheld.

ARGUMENT

I. REGULATIONS THAT RESTRICT THE LOCATION OF TOBACCO ADVERTISING ARE NOT PREEMPTED BY THE CIGARETTE LABELING AND ADVERTISING ACT.

The court of appeals correctly held that Massachusetts' regulations limiting the permissible locations for cigarette advertising are not preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"). Pub. L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340.[7] The Act's purpose, set forth in Section 2, is

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[7] Because the FCLAA regulates only cigarettes, 15 U.S.C. § 1332, petitioner United States Smokeless Tobacco Company and petitioners Altadis U.S.A., Inc., *et al.*, make no claim of federal preemption.

to provide a uniform warning to the public of the health effects of cigarette smoking and, at the same time, to avoid the burden to cigarette manufacturers that could result from state or local governments prescribing different "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331. *See* 15 U.S.C. § 1333 (prohibiting the sale or advertisement of cigarettes without specific warning labels). *See Cipollone*, 505 U.S. at 514. To protect these interests, the Act's preemption provision, § 5(b), as amended in 1969, states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b).

Although phrased with sufficient breadth to safeguard Congress's goal of a uniform national health warning, § 5(b) nowhere indicates that Congress intended to displace the historic police power of the States to restrict the location of commercial advertising. *See St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274-275 (1919). Petitioners' sweeping construction of § 5(b) would grant cigarette manufacturers the right to advertise in any location, in any community, regardless of whether that advertising would undermine any variety of legitimate local interests. Under such a regime, States and localities would be powerless to prohibit cigarette advertising in public buildings (even those where smoking is prohibited), on public transit systems, in areas adjoining school properties, in municipal sports stadiums, or even at the town little league

field.[8] Such an unusual invasion of local control by federal authority should not be inferred from the general language of § 5(b), which contains no indication of such intent. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (demanding "language much plainer than the text of [21 U.S.C.] § 360k" to find that Congress intended to grant immunity from design defect liability to the medical device industry).

Petitioners' argument that the Act broadly preempts state laws "with respect to . . . [cigarette] advertising" rests entirely on this discrete phrase in § 5(b), separated from "both textual and legislative context." *Cipollone*, 505 U.S. at 519, n.16. As explained below, petitioners' construction ignores other limiting language of § 5(b), is contrary to the structure and purpose of the Act, and cannot be reconciled with this Court's construction of the Act in *Cipollone*. Most significantly, petitioners' elliptical construction of the Act ignores the qualifying clause "based on smoking and health," which limits the scope of § 5(b) and demonstrates that locational restrictions, like Massachusetts', are not preempted.

1. In every preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Medtronic,* 518 U.S. at 485, *citing Cipollone,* 505 U.S. at 516. To discern Congressional intent, the Court "examine[s] the explicit

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[8] Moreover, with respect to cigarette *promotion*, petitioners concede only that it is "questionable" whether the Act preempts the "direct and intentional solicitation" of unlawful sales to minors. Pet. Br. 24. Consistent with this view, in the district court petitioners challenged, as preempted, regulations that prohibit the distribution of free tobacco samples and the sale of tobacco products through the mail without verification of the recipient's age, 940 C.M.R. §§ 21.04(1)(a), (1)(c), (4)(a), marketing practices that are known to facilitate minors obtaining tobacco. *See* JA 28, 39, 216; Pet. App. 49a, 58a-59a.

statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). *See Medtronic,* 518 U.S. at 484-485. Although an express preemption clause indicates that at least some state law is preempted, the Court must nonetheless "identify the domain expressly pre-empted by [§ 5(b)]." *Cipollone*, 505 U.S. at 517. In discharging that task, *Cipollone* considered, in addition to the language of the preemption provision, the structure and purpose of the FCLAA as a whole and its legislative history. *Id.* at 519 (majority), 529 (plurality), 534, 539-41 (Blackmun, J., concurring in part and dissenting in part).

The Court's analysis in this case is also informed by "the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (majority), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The court of appeals correctly observed that both "zoning regulations and regulations directed at the safety and welfare of minors . . . 'lie peculiarly within the states' historic police powers.'" Pet. App. 11a (citations and quotations omitted). *See Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (restrictions on tobacco advertising). As it did in *Cipollone*, the Court should construe § 5(b) narrowly in this case to avoid an unwarranted intrusion on the State's sovereign authority. *See Cipollone*, 505 U.S. at 518 (majority); *see also id.* at 524 (plurality) (construction of § 5(b) must be "fair but narrow"); 532 (Blackmun, J., concurring in part and dissenting in part) (Court cannot find preemption "in the absence of clear and unambiguous evidence that Congress intended that result"). *See also California Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316, 331-332 (1997).

2. Petitioners ignore the plain language of § 5(b) when they assert it preempts virtually any state law "with

respect to" the advertising of cigarettes. *See* Pet. Br. 14. Section 5(b) does not prevent the States from enacting laws specifically directed to cigarette advertising; by its terms, it targets for preemption only a subset of cigarette-specific advertising regulations — those "based on smoking and health." 15 U.S.C. § 1334(b).[9] *See Medtronic,* 518 U.S. at 488 (discussing FCLAA preemption provision). Although it is their burden to do so, petitioners make no attempt to demonstrate to this Court that the regulations meet this requirement. Pet. Br. 13-24.

The Massachusetts regulations are not "based on smoking and health," as that phrase is used in § 5(b). Instead, the regulations rest upon a fundamental judgment by the State about the appropriate, and inappropriate, locations for tobacco advertising in view of its influence on children. This judgment is based upon various substantial interests — consumer protection, the protection of children, support for parents, and support for the state policy against tobacco sales to minors. The regulations thus reflect the general interests often furthered in zoning laws. *See Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J.) ("Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually — or more often unilaterally — destructive."). These general interests do not bring the regulations within the phrase "based on smoking and health" as used in this labeling law, which language the Court has determined it must "fairly, but — in light of the strong

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[9] The Senate Report accompanying the 1969 amendments to the Act emphasized this focus. "The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

presumption against pre-emption — narrowly construe . . . ." *Cipollone*, 505 U.S. at 523.

In the lower courts, however, petitioners urged that "the [preemption] clause outlaws *any* state law enacted due to 'health concerns about smoking.'" Pet. App. 53a. *See also* Cert. Pet. 16, n.8 (asserting that "facially tobacco-specific" regulations are inevitably "based on smoking and health"). This broad construction ultimately reads "based on smoking and health" out of § 5(b). As a practical matter, the enactment of almost any *cigarette-specific* marketing regulation could be motivated to some degree by "health concerns about smoking" because the grave health consequences of cigarettes are what distinguish them from virtually all other consumer products.[10] Generally applicable laws would adequately address non-health related issues that arise with respect to the marketing of cigarettes. Thus, petitioners' construction of "based on smoking and health" denies any limiting effect to these words, improperly treating them as mere surplusage. *See Cipollone,* 505 U.S. at 524 (plurality) ("each phrase within [§ 5(b)] limits the universe of [what is] pre-empted by the statute"). *See also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (rejecting construction of ERISA preemption provision that would "read Congress's words of limitation as mere sham").

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[10] For example, petitioners correctly point out that the Massachusetts Attorney General — like most public officials — had health concerns about tobacco use by young people and anticipated that reducing illegal sales of tobacco products to minors would promote the public health. Pet. Br. 3. These expressions of concern do not control whether the regulations are preempted. That question must ultimately turn on whether, by their *effects*, the regulations are within the scope of preemption Congress intended in the Act. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 105 (1992).

3. The text of § 5(b) "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, *quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Considering "the provisions of the whole law, and . . . its object and policy," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and quotations omitted), it is clear that Congress did not intend to preempt State laws that regulate only the location of tobacco advertising. *See Cipollone,* 505 U.S. at 529 (plurality) (considering purpose of FCLAA in construing "smoking and health" clause).

In § 2 of the Act, Congress stated its purpose to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any *relationship* between smoking and health . . . ." 15 U.S.C. § 1331 (emphasis added). By confining its regulatory program to the "relationship" between smoking and health in cigarette advertising and labeling, Congress identified as its chief concern the *informational content* of advertising and labeling. That focus is more specifically reflected in the remainder of § 2. There Congress expressed its purpose to inform the public about "any adverse health effects" of cigarette smoking through inclusion of warning notices on packages and in advertising, and to ensure that "commerce and the national economy" not be "impeded" by diverse labeling and advertising regulations "with respect to any relationship between smoking and health." *Id.* The statement of purpose thus strongly suggests that Congress sought only to preempt state laws that implicate the "relationship between smoking and health" by interfering with the Act's uniform health warning. 15 U.S.C. § 1331. Section 5(b) thus preempts state advertising regulations that require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising. *See, e.g., Vango Media, Inc. v. City of New York*, 34 F.3d 68,

74-75 (2nd Cir. 1994) (holding preempted city ordinance that required one public health message to be displayed for every four tobacco advertisements displayed on city-licensed property). The Act does not, however, preempt state laws that restrict only the locations where cigarette advertising can be displayed.

Moreover, zoning-type regulations do not impede "commerce and the national economy." 15 U.S.C. § 1331. Cigarette advertisers need not modify advertising intended for national or regional distribution to meet Massachusetts' requirements.[11] Compliance with the regulations is achieved simply by removal of advertising in the defined locations near schools and playgrounds. *See Packer Corp.*, 285 U.S. at 111-112 (describing Utah's ban on advertising tobacco products in outdoor locations as "wholly intrastate" and "essentially local").[12]

It would be illogical to conclude that Congress enacted the FCLAA to protect cigarette advertisers from the "burden" of varying state or local laws regulating the placement of outdoor advertising. Pet. Br. 21-22. Even

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[11] In contrast, California's proposal in 1969 to ban all print advertising of cigarettes, *see Cipollone*, 505 U.S. at 515, n.11, would have frustrated this purpose by requiring the many magazines that are distributed nationally or regionally to produce special editions for California.

[12] The Senate Report on the 1969 amendments to the Act stressed that the preemption provision was included to "avoid the chaos created by a multiplicity of *conflicting* [State or local] regulations . . . ." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2663 (emphasis added). The Massachusetts regulations do not conflict with any provision of the FCLAA. Nor do the regulations, which operate exclusively within Massachusetts, "conflict" with locational restrictions in other States.

under petitioners' construction, the Act does not achieve that purpose. As petitioners concede, cigarette advertisers are required to obey *generally applicable* state or local laws on the location of sign advertising, Pet. Br. 23, which vary from State to State, and city to city. *See, e.g.*, Mass. Gen. Laws. c. 93, § 29 (empowering state board to regulate billboards, signs and other advertising devices, and authorizing cities and towns to further regulate and restrict the same) (enacted in 1920). With or without the Massachusetts regulations, "a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances." *Greater N.Y. Metro. Food Council*, 195 F.3d at 109.

4. The plurality holding in *Cipollone* strongly suggests that preemption under the Act is limited to regulation that interferes with the federally mandated health warning in cigarette advertising. There the Court considered whether § 5(b) preempted common law claims asserted by Rose Cipollone's estate against several cigarette manufacturers as a result of her death from lung cancer. 505 U.S. at 508. Although all of the estate's claims generally concerned "smoking and health," the plurality embraced a narrow construction of § 5(b) and held preempted only: (i) a claim alleging that the manufacturers' advertising lacked an adequate warning about smoking and health, and (ii) a claim alleging misrepresentations in advertising that "neutralized" the federal warning. *Id.* at 524, 527-528. Claims of breach of express warranty and an alternative theory of fraudulent misrepresentation were held *not* preempted, even though directed squarely at the manufacturers' advertising. *See id.* at 525 (evidence of an express warranty consisted "largely of statements made in respondents' advertising"); *id.* at 529 (fraudulent misrepresentation claim was "based on allegedly fraudulent statements made in respondents' advertisements"). If FCLAA preemption were as expansive as petitioners say, the Court "could not have allowed the

continued prosecution of [these common law claims] — all of which relate generally to the effects on health of promoting the sale of cigarettes." *Penn Advertising*, 63 F.3d at 1324, *citing Cipollone*, 505 U.S. at 523-31.

Cipollone also emphasized that Congress preserved substantial authority in the States with respect to cigarette advertising. Specifically, Congress did not intend in the FCLAA to "proscribe the regulation of deceptive advertising" by either federal or state authority. *See* 505 U.S. at 529 (plurality). This, the plurality explained, was a further reason to define narrowly the categories of advertising regulation that are "based on smoking and health." The plurality stated that laws based on a "general duty" — such as the duty not to deceive — are not "based on smoking and health" within the meaning of § 5(b). *Id.* at 528-529 (holding fraud claim not preempted). Similarly, the locational restrictions in the Massachusetts regulations, which are based on the general proscription on unfair practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws. c. 93A, § 2(a), are not "based on smoking and health" as that phrase in § 5(b) was construed in *Cipollone*.

5. Nothing in the 1969 amendments to § 5(b) suggests that Congress intended to disrupt the traditional authority of state and local governments to regulate the location of commercial advertising. These amendments strengthened the warning message, prohibited cigarette advertising on radio and television, and gave the Federal Trade Commission authority, previously denied, to require warning labels in cigarette advertising. *See Cipollone*, 505 U.S. at 514-515. (The 1965 Act required warnings only on packaging, and prohibited any governmental authority from mandating warnings in advertising. *Id.*) *See also Brown & Williamson Tobacco Corp.*, 529 U.S. at 148-150.

The focus of Congress in 1969 was on preempting state law that would be inconsistent with the new federal policy of giving the FTC authority to impose warning requirements on cigarette advertisements. Thus, the "narrowing of the pre-emption provision to prohibit only restrictions 'imposed under State law' cleared the way for the FTC to extend the warning-label requirement to print advertisements for cigarettes." *Cipollone*, 505 U.S. at 515. Significantly, Congress retained in § 5(b) the important "smoking and health" limitation it had originally included in the clause. *Id.* at 529 (plurality) (noting that the phrase "relating to smoking and health" in the 1965 Act "was essentially unchanged by the 1969 Act"); *see also id.* at 539 (Blackmun, J., concurring in part and dissenting in part). Thus, the objective in 1969 remained as it was in 1965 — to bar conflicting requirements with respect to the health message on packages or, now, "with respect to" advertising. *Cf. id.* at 519-20 (1965 Act "pre-empted state and federal rulemaking bodies from mandating particular cautionary statements").[13]

Moreover, the legislative history of the 1969 amendments to the FCLAA "plainly expresses an intent to preserve the 'police regulations' of the States." *Cipollone*, 505 U.S. at 530, n.27 (plurality). The Senate Report "emphasized that the 'preemption of regulation or prohibition with respect to cigarette advertising *is narrowly*

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[13] Although the 1969 amendments to § 5(b) did not expand the *substantive* scope of preemption, they clearly enlarged the *forms* of state law health message regulation that are preempted. For example, because § 5(b), as amended in 1969, preempts "requirements or prohibitions . . . imposed under State law," rather than (as under the 1965 Act) simply "statements," *Cipollone* held that the provision can preempt common law claims, and not merely "positive enactments" of the States, as was the case under the 1965 Act. 505 U.S. at 521-522 (plurality), 548-549 (Scalia, J., concurring in part and dissenting in part).

phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*." *Id.* at 529, n.26 (plurality) (*quoting* Senate Report No. 91-566, p. 12)(emphasis in opinion). Massachusetts' tobacco advertising restrictions, enacted to further its law against "the sale of cigarettes to minors," are exactly the type of "similar" police regulation that Congress intended in the Act to preserve.

Congress did not, either in 1969 or at any other time, exhibit an intent to preempt state regulation of the location of cigarette advertising. Indeed, Utah had enacted a law in the 1920's that prohibited all outdoor tobacco advertising, which remains in effect today. *See* Utah Code Ann. § 76-10-102. The existence of the Utah law almost certainly would have surfaced in Congressional discussions of the 1969 amendments if there had been any understanding that the new federal legislation would suddenly negate this law. But research revealed no mention of this law in any of the Congressional deliberations relating to the adoption of the 1969 Act. In fact, Senator Moss of Utah, a strong proponent of tobacco control, made a separate statement criticizing certain of the 1969 amendments, but never mentioned preemption of his State's law. *See* 1970 U.S.C.C.A.N. 2668-2674. Consequently, the most appropriate inference, and one that is consistent with the overall structure and purpose of the 1969 Act, is that Congress harbored no such intent. *See Medtronic,* 518 U.S. at 491 (absence of any reference in Congressional hearings, Committee reports or debates to preemption of state common law remedies confirmed conclusion that no preemption intended).

II. THE MASSACHUSETTS REGULATIONS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT.

Some seventy years ago, this Court sustained against a federal constitutional challenge the Utah law that prohibits all outdoor tobacco advertising, while simultaneously permitting tobacco advertisements in newspapers, magazines and other publications. *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Although that case involved an equal protection rather than First Amendment challenge, what the Court said has direct bearing on the First Amendment claim made in this case:

> "The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." . . . *The Legislature may recognize degrees of evil and adapt its legislation accordingly.*

Id. at 110 (quoting state court) (emphasis added). This same distinction is what justifies *for First Amendment purposes* Massachusetts' decision to restrict publicly visible tobacco advertising in areas near schools and playgrounds, while leaving unrestricted such advertising in other locations, and in magazines, newspapers and other media. Indeed, given the Court's common-sense observation that it is easier to avoid a radio broadcast than a billboard advertisement, if the First Amendment permits Congress to ban tobacco advertising from radio and television, *see* 15 U.S.C. §§ 1335, 4402(f), it necessarily follows that the First Amendment

permits the States to prohibit publicly displayed tobacco advertising near schools and playgrounds.

A. Regulations that Restrict the Location of Publicly Visible Tobacco Advertising to Protect Children from its Influence are Properly Analyzed Under Intermediate Scrutiny.

Unable to persuade the lower courts that the regulations fail to satisfy intermediate scrutiny under the *Central Hudson* test, 447 U.S. at 566, petitioners ask this Court to review Massachusetts' regulation of commercial speech under the strict scrutiny standard applicable to political and other "core" speech. Petitioners propose a significant departure from the Court's jurisprudence. The Court has often explained that commercial speech enjoys "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (citations and quotations omitted). Despite the substantial value to legitimate purchasers of the free flow of accurate commercial information, *44 Liquormart*, 517 U.S. at 496-497, the government may have sound reasons to restrict commercial advertising or solicitations to prevent harm to consumers or vulnerable members of the public. *See Florida Bar,* 515 U.S. at 625; *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 462 (1978). In view of these competing interests, *see Florida Bar*, 515 U.S. at 623, the Court has reviewed commercial speech regulations under the intermediate scrutiny framework set forth in *Central Hudson. See, e.g., Greater New Orleans Broadcasting Ass'n., Inc. v. United States,* 527 U.S. 173, 183-196 (1999). Petitioners present no reason to depart from this precedent with respect to

Massachusetts' location-based limitation of tobacco advertising.

1. Zoning restrictions on the public display of commercial speech present different considerations than the complete suppression of commercial speech, and merit no more than intermediate scrutiny. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the plurality specifically applied the *Central Hudson* test to a city's prohibition on outdoor billboard-type commercial advertising. *Id.* at 507-512.[14] Because Massachusetts has chosen to regulate only publicly visible advertising — thus permitting the continued dissemination of product information through other media — its interests necessarily are focused on the distinct harms associated with such public displays. *Cf. City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (describing the "visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property"). The State, quite clearly, is not trying to suppress altogether the communication of product information to interested consumers. *Cf. 44 Liquormart*, 517 U.S. at 504 ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition" of speech.). This careful tailoring respects the communicative interests involved in commercial speech, even as Massachusetts strives to minimize the serious harms associated with the display of tobacco advertising in areas where children spend a large proportion of their time. "As with other varieties of speech, it follows as well that there

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[14] Indeed, in *Metromedia*, the judgment of this Court — endorsed by the reasoning of seven Justices in that case — was that a city could choose to eliminate commercial billboard advertising entirely from within its jurisdiction to advance aesthetic and traffic safety interests. *See* 453 U.S. at 512 (plurality); *id.* at 550-553 (Stevens, J., dissenting in part); *id.* at 559 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

may be reasonable restrictions on the time, place, and manner of advertising." *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). Even if the complete suppression of all advertising for a lawful product would be presumptively invalid under the First Amendment, zoning-type restrictions on publicly visible advertising should be evaluated according to the intermediate level of scrutiny traditionally associated with various forms of "time, place, and manner" regulations. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (analyzing zoning law as "time, place, and manner regulation").

2. The intermediate scrutiny of *Central Hudson* is also appropriate because Massachusetts' locational restriction limits advertising that presents particular harms to children. Although a law focused on the advertising of a specific product — here, tobacco — can be characterized as "content-based," the Massachusetts regulations draw an entirely permissible distinction. Commercial speech is entitled to "lesser protection" precisely where it is "aimed at . . . the particular adverse effects stemming from [the] content [of that speech]." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.11 (1993).[15] As petitioners note, in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992),

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[15] In *Discovery Network*, 507 U.S. 410, the Court, applying *Central Hudson*, invalidated a city ordinance that prohibited newsracks for commercial publications, but permitted newsracks for publications with noncommercial content, because the ordinance's discriminatory treatment of commercial speech was entirely unrelated to the city's esthetic and safety interests. *Id.* at 424-428. Because the ordinance was "content based," the Court rejected the city's separate argument that it could be justified as a "time, place, and manner" restriction. *Id.* at 429. The Massachusetts regulations, on the other hand, make both an appropriate content distinction and restrict only the "place" of advertising. Thus, the regulations clearly require no more than intermediate scrutiny.

the Court included commercial speech among those categories of "proscribable" speech that may be regulated with reference to its content. *Id.* at 388-389; s*ee id. at* 422 (Stevens, J., concurring) ("It is . . . beyond question that the Government may choose to limit advertisements for cigarettes, *see* 15 U.S.C. §§ 1331-1340, but not for cigars . . . ."). *R.A.V.* cited the risk of fraud as "one of the characteristics" of commercial speech "depriving it of full First Amendment protection" and justifying its content-based regulation. 505 U.S. at 388-89. If the government can impose content-based restrictions on commercial speech to deter fraud, it follows with even more force that it may restrict the influence of tobacco advertising in promoting a product that is addictive, dangerous and illegal for sale to minors.

Massachusetts is restricting advertising that exerts an undue influence on a vulnerable class — children and adolescents — with potentially grave consequences. *See 44 Liquormart*, 517 U.S. at 498 (plurality) ("[T]he State . . . may restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers."); *Ohralik*, 436 U.S. at 464-465 (State addressed a "well founded" perception of harm where person solicited was "vulnerable to influence"). By heavily promoting their products near schools and playgrounds, petitioners "exploit consumers, children, who are unable to protect themselves." *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304, 313 (1934).[16] Nearly all first use of tobacco occurs before high

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[16] In *Keppel & Bro.*, the Court affirmed an order of the Federal Trade Commission preventing the sale of candy in "break and take" assortments, where the price or amount of the candy received was affected by chance. Although the Court assumed the practice "[did] not involve any fraud or deception," it nonetheless held it to be an unfair method of competition because it induced children "too young to be capable of exercising an intelligent judgment" to purchase an undesirable article. *Id.* at 309, 314.

school graduation and, as a result, "young people are the chief source of new consumers for the tobacco industry . . . ." JA 187, 192. Nonetheless, petitioners' advertising — rich in images with youthful appeal — is highly visible in locations where children walk, gather and play, such as near schools and playgrounds. JA 95, 105-106, 183, 236; Ldg. 58. Through its youthful imagery and by its sheer ubiquity, tobacco advertising conveys to those "too young to be capable of exercising an intelligent judgment," *Keppel & Bro.*, 291 U.S. at 309, that tobacco use is desirable and pervasive. JA 182, 207. Petitioners' advertising clearly engenders "the potential for deception or confusion" that allows for regulation of commercial speech based on its content. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983).

Moreover, in restricting publicly visible tobacco advertising near schools and playgrounds, Massachusetts seeks to promote the efficacy of its law prohibiting the sale or distribution of tobacco to minors. Mass. Gen. Laws c. 270, § 6. By restricting tobacco *advertising* in aid of a statutory prohibition on tobacco *sales*, Massachusetts makes the most appropriate "content" distinction it could make in limiting commercial speech. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.").

For the same reason, petitioners are wrong to contend that the regulations amount to impermissible viewpoint discrimination. Pet. Br. 39. Massachusetts has a neutral basis for its regulation (support of its tobacco sales law), which forecloses any argument that "official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. In addition, by targeting advertising because of its influence on children, the State seeks to address a harm, not "silence" a viewpoint. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518

U.S. 727, 771 (1996) (Stevens, J., concurring) (finding provision permitting operator to prohibit indecent programming on cable channels viewpoint neutral). By limiting the regulations to "promotional" speech, *see* 940 C.M.R. § 21.03 (defining "advertising"), Massachusetts has merely ensured that the regulations will not restrict fully protected noncommercial speech. Because petitioners retain "the full panoply of protections available [for their] direct comments on public issues . . . there is no reason for providing similar constitutional protections when such comments are made in the context of commercial transactions." *Bolger,* 463 U.S. at 68; *Central Hudson*, 447 U.S. at 563 n.5.

3. The Massachusetts regulations implicate none of the concerns that prompted criticism of intermediate scrutiny as the appropriate standard of review in *44 Liquormart*, 517 U.S. 484. There, the plurality questioned the applicability of intermediate scrutiny where the government seeks to deprive *adults* of accurate information about their chosen products through a "blanket prohibition" on speech, in circumstances where the absence of direct regulation suggests the government may be regulating speech "to pursue a nonspeech related policy." *Id.* at 496-504 (plurality); *see id.* at 518 (Thomas, J., concurring). *See also, e.g., Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 770-773 (1976) (criticizing the State's "highly paternalistic approach" in prohibiting advertising of prescription drug prices). But Massachusetts has a different objective — to avoid exposing an *unintended* audience to tobacco advertising and its collateral harms, without altering the communicative message of petitioners' advertising to its intended, adult audience. Indeed, petitioners allege it is their intention to advertise only to adults, and then only to those adults who have already made the decision to use tobacco ("adult smokers"). JA 19, 30, 68. To actually achieve this

objective, however, the public display of tobacco advertising in areas frequented by children must be restricted. There is no need for heightened review where, in the interest of protecting children and supporting its laws prohibiting tobacco sales to minors, a State imposes a zoning-type restriction on publicly visible advertising that leaves ample alternative means of advertising to adults.

B. The Regulations Satisfy Intermediate Scrutiny under the *Central Hudson* Test.

Under the *Central Hudson* test, the Court first inquires whether the commercial speech at issue concerns a lawful activity and is not misleading; if not, it is without First Amendment protection. *Central Hudson*, 447 U.S. at 566.[17] The remainder of the test holds that the government

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[17] The State does not concede that petitioners' advertising "concerns lawful activity and is not misleading." These issues were neither adjudicated nor stipulated below. *See* Pet. App. 17a, 68a. Petitioners repeated characterizations to the contrary are incorrect. Pet. Br. 8, 12, 35. Indeed, the regulations declare petitioners' advertising practices to be "unfair or deceptive" under Mass. Gen. Laws. c. 93A, § 2(a). *See* 940 C.M.R. §§ 21.02, 22.02, Pet. App. 105a, 115a. It was, however, unnecessary for the district court to adjudicate these issues in connection with the State's motion for summary judgment. Because the advertising regulations are clearly permissible when analyzed against the balance of the *Central Hudson* factors, the Attorney General asserted that they may stand even if, *arguendo*, the petitioners' advertising concerned lawful activity and were not misleading. Had the district court not granted summary judgment to the State, it was open to the Attorney General to submit proof at trial that the petitioners' advertising concerns unlawful activity or is misleading. *See* JCA 1394-1395, 1518-1519, 1527-1528 (FDA explaining that petitioners' advertising practices induce minors to use tobacco products, which they cannot legally purchase). *See, e.g., Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 78-83, *cert. denied*, 513 U.S. 1016 (1994).

may regulate even non-misleading commercial speech concerning a lawful activity where (ii) it asserts a substantial interest in regulating the speech, (iii) the regulation directly advances the governmental interest asserted, and (iv) the regulation is not more extensive than necessary to serve that interest. *Id.* at 566. As explained below, the court of appeals correctly held that the Massachusetts regulations meet each requirement under the *Central Hudson* framework. Pet. App. 14a.

1. Massachusetts has a compelling interest in protecting children by reducing their exposure to tobacco advertising.

By its regulations Massachusetts seeks to limit the daily exposure of children and adolescents to the powerful appeal of tobacco advertising. The protection of children is a compelling State interest. *See Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("basic in a democracy, stand the interests of society to protect the welfare of children"). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court held that the State's interest in the "well-being of its children" justified restrictions on the dissemination of otherwise protected expression where "minors' exposure to such material might be harmful." *Id.* at 639. Since *Ginsberg*, the Court has "repeatedly recognized the governmental interest in protecting children from harmful materials." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997). *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (government has a "compelling interest in protecting the physical and psychological well-being of minors"). Because Massachusetts has "acted to restrict a mode of communication that . . . reaches a group the [State] has a right to protect[,]" *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 94 (1977), its regulations are entitled to a significant measure of deference. *See Capital*

Broadcasting Company v. Mitchell, 333 F. Supp. 582, 585-586 (1971) (upholding prohibition of cigarette advertising on television and radio), *summarily aff'd*, 405 U.S. 1000 (1972).

Two related and substantial interests are also served by the regulations. The regulations support both Massachusetts and federal policies against selling or giving tobacco to minors. *See* Mass. Gen. Laws c. 270, § 6; 42 U.S.C. § 300x-26(b) (providing federal funding for state efforts to "reduc[e] the availability of tobacco products to individuals under the age of 18"). The regulations also support parents' rights to raise their children free from inducements to use tobacco. "Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.'" *Bellotti v. Baird*, 443 U.S. 622, 639 (1979), *quoting Ginsberg*, 390 U.S. at 639. Parents who limit their children's exposure to tobacco advertising in magazines, newspapers, the Internet, or direct mail,[18] are powerless to shield a child from advertising posted near schools and playgrounds. Support for parental authority is a substantial interest that can justify laws that restrict the exposure of children to speech intended for adults. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978).

2. Restricting the daily exposure of children to tobacco advertising will materially advance the State's interests.

The third prong of the *Central Hudson* test asks whether the challenged regulation of commercial speech

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[18] *See Bolger*, 463 U.S. at 73 (noting that parents can "exercise substantial control over the disposition of mail once it enters their mailboxes").

"directly advances the governmental interest asserted." 447 U.S. at 566. The government must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Although the government must offer more than "mere speculation or conjecture," *id.* at 770, its third prong burden may be met by the submission of studies, surveys and even anecdotal evidence indicating that the regulation will advance the articulated governmental interest. *Florida Bar*, 515 U.S. at 626. In appropriate cases, commercial speech restrictions may be justified by reference to "history, consensus and 'simple common sense.'" *Id.* at 628, *quoting Burson v. Freeman*, 504 U.S. 191, 211 (1992). *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (government's third prong burden met because "Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling").

At the outset, it is apparent that the regulations will advance the State's interest in promoting compliance with its law prohibiting distribution of tobacco to minors. The Utah Supreme Court recognized long ago that "[t]he prohibiting of billboard and other placard advertising has a direct bearing and relation to the object of [state law] in attempting to prevent the sale to and use of cigarettes and tobacco by minors." *State v. Packer Corp.*, 297 P. 1013, 1018 (Utah 1931). In addition, it is self-evident that the regulations will advance the State's interest in supporting parents' efforts to minimize their children's exposure to tobacco advertising. Petitioners do not challenge the regulations' advancement of these two interests. Pet. Br. 42-44.

In addition, the State's extensive evidentiary submission amply demonstrates that the regulations will directly advance its interest in addressing the incidence of underage tobacco use. 940 C.M.R. §§ 21.01, 22.01, Pet.

App. 105a, 115a. As discussed *supra* at 4-7, a broad range of evidence that has accumulated over the past two decades converges on the conclusion that tobacco advertising promotes both the initiation of tobacco use by minors and reinforces that use in minors who smoke. Ldg. 3.[19] The Surgeon General comprehensively reviewed this evidence in 1994, JA 187-209, and updated his review in 2000, concluding that "[r]egulation of advertising and promotion [of tobacco], particularly that directed at young people, is very likely to reduce both prevalence and uptake of smoking." Ldg. 2. These findings, published pursuant to a delegation from Congress to report periodically on tobacco and health, warrant substantial deference. *See* 15 U.S.C. §§ 1337, 1341(c).

The "quantum of empirical evidence" needed to satisfy judicial scrutiny under the First Amendment "will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't. PAC*, 528 U.S. 377, 391 (2000). The notion that advertising

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[19] In addition, there is powerful historical evidence of the capacity of advertising and promotion to stimulate youth demand for smokeless tobacco and cigars. In the late 1960's, petitioner U.S. Tobacco Company successfully revived a declining market for smokeless tobacco products by targeting young males in its promotion and advertising. Intensive marketing of smokeless tobacco featured a "graduation" strategy whereby low-nicotine "starter" brands were featured in advertising. Over the course of fifteen years, the rate of smokeless tobacco use by young males increased tenfold. JA 219; Ldg. 5-6; JCA 1395. *See* Pet. App. 23a. The National Cancer Institute reports that recent data on cigar use among adolescents is "alarming," and that cigars are being "heavily promoted in ways likely to influence adolescent use." JA 239, 240, 243. Although the use of sex and celebrity to sell cigarettes has been forbidden by the cigarette industry's voluntary code since 1965, these appeals are a regular feature of cigar marketing. JA 243. *See* Pet. App. 24a-25a.

promoting the pleasures and rewards of tobacco use can influence children to make inappropriate choices is neither novel nor implausible. *See, e.g., Bellotti*, 443 U.S. at 635 (observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be dētrimental to them"). The evidence of the effect of tobacco advertising on young people thus confirms what human experience would suggest.[20] In any event, the extensive submission that accompanied the State's motion for summary judgment far exceeds what the Court has deemed necessary in reviewing commercial speech restrictions similar in purpose or effect to the Massachusetts regulations. *See Metromedia,* 453 U.S. at 509 (city's finding that billboards threaten traffic safety justified by the "accumulated, commonsense judgments" of lawmakers and courts); *Ohralik*, 436 U.S. at 464 (rule intended to prevent overreaching and undue influence justified where State's "perception of the potential for harm in [the] circumstances . . . [was] well founded"). *See also Florida Bar*, 515 U.S. at 626-629.[21]

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[20] For similar reasons, the Court did not demand "scientifically certain criteria of legislation" in *Ginsberg v. New York;* it was enough for the New York legislature rationally to conclude that the sale to children of sexually explicit magazines presented a danger against which they should be guarded. 390 U.S. at 641-43.

[21] The smokeless tobacco and cigar petitioners argue that they should be exempt from Massachusetts' regulation of tobacco advertising. United States Tobacco Br. 16; Altadis U.S.A. Inc. Brief 5. It would, however, be irrationally inconsistent for Massachusetts to restrict cigarette advertising, but not the advertising for other hazardous tobacco products that are also illegal for sale to minors. This is precisely the type of inconsistency that the Court has found unacceptable in commercial speech regulation. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (prohibition on displaying alcohol content on

Petitioners' suggestion that the State has no interest in protecting children from "truthful" tobacco advertising is misplaced. Pet. Br. 12, 35. The Surgeon General found that the sheer volume and repetition of tobacco advertising leads young people to overestimate the prevalence and "normalcy" of smoking among both peers and adults, and to smoke themselves. JA 197, 207. The Institute of Medicine similarly concluded: "The impression that tobacco use is desirable and normative is conveyed through image advertising and promotions that make tobacco products highly visible in public spaces — if not by their presence, then by proxy in the forms of brand trademarks, insignia, logos and [other] items . . . ." JA 178-179. Cigarette advertisers themselves have said they attempt to achieve a "friendly familiarity" for tobacco products through extensive advertising in diverse media. JCA 1393; *see* Ldg. 17. Consequently, it is necessary to create zones around schools and playgrounds that are free of all publicly visible tobacco advertising to address this effect. JA 197, 207, 123-125; *see also* JCA 2242-2271.

In settling its litigation under the MSA, Massachusetts did not agree to refrain from regulation of tobacco advertising, nor could it have done so. *See United States v. Winstar Corp.*, 518 U.S. 839, 860 (1996) (government may not contract to surrender certain reserved powers), *citing Stone v. Mississippi*, 101 U.S. 814, 817 (1880) (legislature cannot contract away power of a State to regulate public health and public morals). Petitioners' suggestion that the State cannot impose incrementally broader restrictions than those in the MSA is therefore misplaced. Pet. Br. 43. The Attorney General recognized, when he proposed the regulations months before the MSA was executed, that it was necessary to create zones around

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beer labels made no rational sense where government failed to prohibit disclosure of alcohol content in wines and spirits).

schools and playgrounds that are free of publicly visible tobacco advertising. The MSA falls far short of that goal. Retail tobacco advertising is largely unrestricted under the MSA. JA 259, 263-264.[22] Yet retail stores display a great deal of both exterior and interior tobacco advertising. JA 95, 179. Moreover, since the execution of the MSA, petitioner cigarette companies have substantially *increased* their total advertising expenditures and, in particular, their expenditures for exterior retail advertising. Ldg. 27, 28. These expenditures have translated into increased youth exposure to retail tobacco advertising, as documented in a 2000 University of Illinois study. Ldg. 61-62. The fact that petitioners have intensified their advertising in areas left unrestricted by the MSA — and in places where it will reach young people — is firm proof of the continuing need for the Massachusetts regulations.

3. The regulations are narrowly tailored in targeting advertising near schools and playgrounds.

The final question under *Central Hudson* is whether the speech regulation is "more extensive than necessary" to serve the governmental interest that supports it. *Central Hudson*, 447 U.S. at 566. The First Amendment demands "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . . [* * *] Within those bounds we leave it to governmental

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[22] The MSA permits exterior retail advertising not larger than 14 square feet, JA 259, which easily accommodates most advertising commonly displayed on and near retail stores. The MSA places no restrictions on interior retail advertising. And, of course, the MSA binds only the cigarette companies that signed it; it does not restrict advertising by smokeless tobacco or cigar companies, by cigarette companies that are not signatories, or by cigarette companies that might enter the market in the future.

decisionmakers to judge what manner of regulation may best be employed." *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citations and quotation marks omitted). *See Edge Broadcasting*, 509 U.S. at 429-435. Those laws that have failed this aspect of *Central Hudson* "burden substantially more speech than necessary," *Edge Broadcasting*, 509 U.S. at 430, or amount to an outright ban on the dissemination of important product information. *See, e.g., 44 Liquormart*, 517 U.S. at 497-498, 501; *Virginia Bd. of Pharmacy*, 425 U.S. at 770. *Cf. Bates*, 433 U.S. at 355 (broad prohibition on advertising by lawyers).

Because the regulations do not affect tobacco advertising outside the school and playground zones, or in magazines, newspapers, direct mail or other media, they are appropriately tailored to address the State's interest. Petitioners remain free to communicate information concerning price and product attributes to adults through these permitted channels. *See Florida Bar*, 515 U.S. at 633-634 (availability of alternative channels for commercial speech favors sustaining regulation). These factors, and those discussed below, demonstrate that the regulations clearly satisfy the fourth prong of the *Central Hudson* test.

1. The regulations target tobacco advertising that is seen repeatedly and unavoidably by children. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974), *quoting Packer Corp.*, 285 U.S. at 110. This reflects narrow tailoring. *See Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 744 (plurality) (upholding restrictions on sexually explicit programming that can be seen by children "without sufficient prior warning"); *Pacifica Foundation*, 438 U.S. at 749-751 (upholding order prohibiting daytime broadcast of "Filthy Words" monologue that was "uniquely accessible to children, even those too young to read"). Even where the Court, applying strict scrutiny, invalidated a

complete ban on "dial-a-porn" services, it observed that the government might constitutionally restrict "public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid." *Sable Communications*, 492 U.S. at 127-128. Children cannot be presumed "to protect themselves from speech which . . . generally may be avoided by [unwilling adults] through the exercise of choice." *Pacifica Foundation*, 438 U.S. at 757-758 (Powell, J., concurring). *See id.* at 748-750 (majority). Thus, the regulations are necessary, and valid, even though they incidentally reduce the volume of tobacco advertising that adults view. *See Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 194 (government may "incidentally . . . restrict a certain amount of [commercial] speech" that is not the object of its concern if it does so to achieve a broader, legitimate objective).

Carey v. Population Services International, 431 U.S. 678 (1977), upon which petitioners rely heavily, does not control here. Pet. Br. 36-37. In *Carey*, the Court struck down a New York law that prohibited *all* contraceptive advertising, noting that such advertising "state[s] the availability of products and services that are not only entirely legal, but *constitutionally protected*." 431 U.S. 701 (emphasis added, citations omitted). But even *Carey* "left open the possibility that the State could implement more carefully drawn restrictions." *Central Hudson*, 447 U.S. at 565-566. In his concurring opinion in *Carey*, Justice Powell discerned nothing in the Court's decision "to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young." *Carey*, 431 U.S. at 712 (Powell, J., concurring in part); *see id.* at 716-717 (Stevens, J., concurring in part). The Massachusetts regulations, which impose limited restrictions on a product illegal for sale to minors, are not invalid under *Carey*.

2. Petitioners make no argument under *Central Hudson*'s fourth prong that the regulations fail reasonably to "fit" the State's interest. *See Fox*, 492 U.S. at 480. That is, petitioners do not dispute that children will frequently be exposed to tobacco advertising when they walk, gather and play in areas around their schools and playgrounds. Indeed, since 1990, the cigarette industry's voluntary advertising code has prohibited cigarette advertising on billboards that are within 500 feet of any school or children's playground and the distribution of free tobacco samples "within two blocks of any centers of youth activities, such as playgrounds [and] schools . . . ." JA 98-99. The Attorney General's reasonable determination to draw the line at 1,000 feet (approximately three blocks) is entitled to deference. *Fox*, 492 U.S. at 480.[23] *Cf. Hill v. Colorado*, 120 S.Ct. 2480, 2495 (2000) (according a "measure of deference" to legislature's judgment in setting health clinic buffer zone); *Burson*, 504 U.S. at 209-210 (declining to require "proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud"). *See also Grayned v. City of Rockford*,

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[23] The FDA's proposed rule would have prohibited all outdoor tobacco advertising within 1,000 feet of schools and playgrounds. JA 235. The FDA stated that these "are places where children and adolescents spend a great deal of time and should therefore be free of advertising for [tobacco] products." *Id.* *See* JA 235-237. The FDA found particular reasons to prohibit signs on retail stores in these zones: "Young people are more likely to frequent stores near schools, especially older adolescents, and these venues should therefore be free of advertising for tobacco products." JA 236. *See* Ldg. 62 (study reporting that "three out of four teenagers visit a convenience store at least once per week"). Studies in Massachusetts and elsewhere have shown that there is more tobacco advertising on signs "in and around stores near schools and playgrounds than in stores generally." JCA 1555. *See* JA 105-106; 235-238; JCA 1528, 1552; Ldg. 62.

408 U.S. 104, 117-120 (1972) (recognizing "special characteristics of the school environment").[24]

Nonetheless, petitioners argue that the Attorney General's determination to restrict advertising to a distance of 1,000 feet from schools and playgrounds is overbroad because the restricted areas may be substantial in three urban settings. Pet. Br. 45. Such a discrete claim is out of place in this facial challenge to the regulations. *See INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (declining to address "as-applied" claims in facial challenge).[25] In any event, the fourth prong does not inquire, in the abstract, whether a regulation will be far-reaching. If that were the case, the Court would not have upheld San Diego's complete ban on off-site commercial billboard advertising. *Metromedia*, 453 U.S. at 505-512 (plurality). *Cf. Renton*, 475 U.S. at 53 (reasonable alternatives for communication existed where five percent of the city's land area remained open for potential use as adult theater sites). Rather, *Central Hudson* asks whether the regulation goes more than "marginally beyond what would adequately have served the governmental interest." *Fox,* 492 U.S. at 479. By

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[24] Moreover, by restricting interior retail advertising placed below five feet, the regulations prevent the exposure of young children to tobacco advertising that may be proximate to products they purchase and that is obviously not positioned to reach adults. *See* JCA 2384-85. Similar forms of display restrictions have been upheld with respect to adult magazines. *See, e.g., Upper Midwest Booksellers Ass'n. v. City of Minneapolis*, 780 F.2d 1389, 1394-95 (8th Cir. 1985) (upholding ordinance requiring that adult magazines be displayed for sale in sealed packages with opaque covers).

[25] Petitioners may not bolster their facial challenge by reliance on the overbreadth doctrine, which is inapplicable to commercial speech. *See Fox*, 492 U.S. at 481.

that measure, the Massachusetts regulations should be upheld.

3. In these circumstances, there are no "obvious less burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 507 U.S. at 417, n.13. Regardless of the State's other tobacco control initiatives, "[e]fforts to prevent the onset or continuance of tobacco use [will] face the pervasive, countervailing influence of tobacco promotion by the tobacco industry . . . ." Ldg. 2. Because the State seeks to curb this influence in areas children frequent, the advertising restrictions represent the logical, practical and direct solution to the problem. *See Fox*, 492 U.S. at 479 (noting that, in *Metromedia*, 453 U.S. at 508, it was enough for the city to conclude that the billboard ban was "perhaps the only effective approach").

Petitioners argue that several nonspeech forms of regulation — essentially stepped-up enforcement of the youth sales law — should substitute for the advertising regulations. Pet. Br. 45.[26] Through its advertising

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[26] Indeed, this is the focus of the other provisions of the regulations, which increase a retailer's responsibility to determine the ages of tobacco purchasers and prohibit self-service displays, distribution of free samples, and other practices that facilitate minors obtaining tobacco products. 940 C.M.R. §§ 21.04(1)-(4), 22.06(1)-(4), Pet. App. 108a-110a, 120a-123a. Although demanding that the State do more to restrict youth access to tobacco, certain petitioners have challenged under the First Amendment the requirement that tobacco products be kept "out of reach of all consumers," despite this provision's obvious anti-theft justification. Pet. Br. 5 n.2. Because the prohibition of self-service displays is a restriction on the physical location of the actual tobacco product, the court of appeals correctly held that it does not implicate the First Amendment. Pet. App. 35a-37a. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982).

restrictions, however, Massachusetts seeks to reduce youth *demand* for tobacco products, something increased law enforcement simply cannot do.[27] In addition, a 1997 survey indicated that only 33.4% of Massachusetts students who smoke cigarettes usually obtain them by buying them in a store. JA 290. Even perfect enforcement of the tobacco sales law would not address tobacco use by those minors who get their cigarettes other ways. *Id.* For these and other reasons, federal health authorities recommend that the State implement *comprehensive* measures to address youth tobacco use, including enforcement of the tobacco sales laws, youth-targeted advertising restrictions, tobacco health education programs and counter-tobacco advertising. JA. 212; Ldg. 11. With the promulgation of the challenged regulations, Massachusetts put all of these necessary elements in place. JA 90-96; Ldg. 13-15.

The petitioners have identified nothing remotely similar to the untried, "obvious" and clearly effective alternatives described in cases that have found this factor significant. *See, e.g., 44 Liquormart*, 517 U.S. at 507 ("perfectly obvious" that goal of higher alcohol prices could be achieved by direct price regulation or increased taxes, rather than an advertising ban); *Discovery Networks*, 507 U.S. at 417 (city could have addressed safety and aesthetic concerns regarding newsracks by directly regulating their size, shape, appearance or number, rather than banning only those with a commercial content).[28] Where Massachusetts

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[27] As the Utah Supreme Court recognized: "It is almost useless to pass laws prohibiting the sale of tobacco to minors, and at the same time make no attempt to restrict the solicitation of these same minors by all kinds of alluring and attractive advertisements." *Packer Corp.*, 297 P. at 1017.

[28] The petitioners' only proposal which is not implemented in Massachusetts is criminalizing or prohibiting the possession of tobacco by minors. Whether it would be good

has a nationally recognized tobacco control program, but nonetheless continues to experience unacceptable levels of youth tobacco use, the *Central Hudson* test does not require extensive second guessing of its decision to restrict advertising: "Our commercial speech cases recognize some room for the exercise of legislative judgment." *44 Liquormart*, 517 U.S. at 508 (plurality), *citing Metromedia*, 453 U.S. at 507-508.

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For the reasons explained above, the Massachusetts regulations do not warrant heightened review. The regulations would, however, meet strict scrutiny even if that test applied. Under a strict scrutiny standard, "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling state interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications,* 492 U.S. at 126. The protection of children is a compelling state interest, *id.*, which clearly is furthered by these advertising restrictions. *See supra* at 36-42. The regulations are also sufficiently narrowly tailored to meet even strict scrutiny. They leave numerous channels for speech to adults. And, for the State to prevent harm to children from tobacco advertising they will unavoidably confront near their schools and playgrounds, there is no "less restrictive" alternative — indeed *no* alternative — to prohibiting its display. *Cf. United States v. Playboy Entertainment Group*, 529 U.S. 803, 826-827 (2000) (capacity for individual households to block sexually explicit cable channels provided less

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public policy to criminalize tobacco possession, with its attendant burden on law enforcement resources, while affording minors no protection from pervasive tobacco advertising, is open to debate. *See* Ldg. 10. Neither the Surgeon General nor the CDC *Best Practices* Report includes this as a recommended tactic in tobacco control. Ldg. 2, 11; JCA 679-686.

restrictive alternative, protective of children, to broad restriction of indecent speech). Thus, the Massachusetts regulations, which address one of the State's — and indeed the Nation's — most urgent problems, are fully consistent with the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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